Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1490

S & H PACKING CO., INC., a California corporation,

Petitioner,

vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONSE

Anthony D. Terry
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Counsel for Respondent

Dated: June 26, 1975

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S & H PACKING CO., INC., a California corporation,
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vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents pray that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 21, 1975, be denied.

Statement of the Case

Respondents respectfully disagree with the Petitioner's statement of the case, in that it does not set forth the true nature of the issues, as litigated in the United States District for the District of Arizona or the Court of Appeals for the Ninth Circuit. The Respondents therefore wish to correct the statement of the case and add the following:

The true nature of Respondents' claim against Petitioner is that Petitioner wrongfully converted Respondents' money by accelerating payment due on promissory notes pursuant to the written contract executed on December 31st, 1970.

Petitioner's sole defense to this wrongful conversion is

that there was an oral modification of the agreement arising from the provision of certain monies to the Respondent. However, Petitioner provided these monies to Respondents pursuant to the agreement which obligated Petitioner to furnish these monies to the Respondents and which was entered into at the same time the written agreement of December 31st, 1970 was executed. Petitioner's agent, Robert Horwath admitted in his deposition that Petitioner was to furnish whatever money was necessary to finance Respondents' farming operations.

In March of 1971, Respondents were unable to meet their payroll and had to make other expenditures to finance the tomato crop operations. Pursuant to the aforementioned mutual oral agreement, Respondents requested financial backing from the Petitioner.

The Petitioner acting through its president, Robert L. Horwath, met with Respondents in Nogales, Arizona, at which time Mr. Horwath agreed to provide $125,000.00 plus some additional monies to the Respondents. However, this offer was accompanied by conditions which were totally unacceptable to the Respondents. Unable to come to an agreement, on or about March 31st, 1971, both parties shut down their operations.

The next day, Petitioner did agree to furnish $125,000.00 immediately to the Respondents and to pay additional weekly increments of money to the Respondents to finance the farming operations. There was no agreement to accelerate the notes due under the December 31st, 1970 contract.

The District Court and the Court of Appeals found that no other agreement or oral modification was made at that time. Since the affirmative defense of oral modification collapsed, the Court of Appeals entered a judgment for tortious conversion against the Petitioner for unilaterally withholding $180,000.00 then due to the Respondents on the account for crop profits.

It is Respondents' position that the monies furnished by Petitioner to Respondents was pursuant to a prior mutual agreement. Petitioner cannot show that any additional consideration was furnished or that there was a mutual intent of the parties to form an oral modification. The District Court's findings, as affirmed by the Court of Appeals, should not be disturbed and Petitioner's Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I

PETITIONER TORTIOUSLY CONVERTED RESPONDENTS' PROPERTY BY BREACHING THE DECEMBER 31, 1970 CONTRACT, WHICH WAS NOT ORALLY MODIFIED.

According to the December 31, 1970 contract, Respondents' payment to Petitioner for his partnership interest was to be a series of promissory notes due and payable in annual installments between March 31, 1971 and December 31, 1975. In June of 1971, Petitioner breached the contract terms and was guilty of tortious conversion when he accelerated the payment of the notes and withheld money due to Respondents on account at that time. In affirming the District Court's opinion, the Court of Appeals stated:

> "... appellant's unilateral withholding of the sum of $180,000.00 then due appellees on the accounting for crop profits was a tortious conversion." (Petitioner's Appendix at 3)

Petitioner contends that there was no tortious conversion because of an oral modification of the contract, by which Petitioner would advance Respondents certain sums of money during the growing season and Respondents would accelerate to June of 1971 the payment of their promissory notes under the December 31, 1970 contract.

The Court of Appeals affirmed the District Court's opinion in finding that there was no oral modification and stated:

> "We conclude from the record that the District Court's findings of fact rejecting the contention of an oral modification of the written contract are amply supported by relevant evidence ...." (Petitioner's Appendix at 2)

Petitioner claims that the District Court's finding as affirmed by the Court of Appeals are wholly without merit. However, the facts deny Petitioner's conclusion. An oral modification of a written contract demands the presence of two elements. The Court of Appeals stated these elements in its opinion:

> "The appellant in its assertion of an executed oral modification of the written agreement carried the burden of proving these two elements: First, a mutual intention on the part of the parties to modify the contract. Yeazell v. Copins, 98 Ariz. 109, 116, 402 P.2d 541, 545 (1965). Second, that any such intended modification was supported by additional consideration. Pleasant v. Arizona Storage & Distributing Co., 34 Ariz. 68, 76, 267 P. 794 (1928) Petitioner's Appendix at 2)

Petitioner did not show that both elements were present.

First, there was no mutual intent to make an oral modification. At the trial all of the Respondents testified that they had no such intention.

Petitioner cites apparently conflicting testimony by Fernando de Saracho to show mutual intent. But mere conflicting testimony will not support a grant of appeal. Credibility is for the trial court to decide. The Court of Appeals noted this when it stated:

> "The evidence presented by the parties was conflicting. The District Court had the advantage of seeing and hearing the witnesses in person and had full opportunity to judge their credibility. The District Court's findings of fact are definite and explicit in finding adversely to all of the appellant's contentions of fact." (Petitioner's Appendix at 2)

Second, there was no additional consideration. Petitioner's agent, Robert Horwath, admitted that he had agreed to supply Respondents with whatever money was required to back Respondent's farming operation. The payment to Respon-

dents accorded with this agreement. It is obvious that additional consideration for oral modification cannot consist of whatever is already due and owing. Pleasant v. Arizona Storage & Distribution Company, 34 Ariz. 60, 77, 267 P. 794, 797 (1928). Since Petitioner was obligated to furnish Respondents with whatever money was necessary, the money supplied was not additional consideration.

In fact what occurred was a case of financial extortion. Petitioner held money belonging to the Respondents. Respondents relied on Petitioner's agreement to supply financial backing for the venture. Petitioner than put a financial squeeze to the Respondents and refused to forward any further money to them unless they agreed to accelerate the notes and thereafter asserted there had, in fact, been a modification of the written agreement. Respondents' rejection of the offer and subsequent stopping of operations was a justifiable reaction to this financial pressure. Petitioner's ultimate provision of the money occured because of his prior legal obligation to Respondents.

Upon these facts, the District Court found there was no mutually agreed modification of the December 31, 1970, written agreement. Therefore, the withholding of money due Respondents was a tortious conversion. The Court of Appeals reached this conclusion when it stated:

> "When the District Court found that there was no mutually agreed modification of the December 31, 1970 written agreement, a fortiori, the appellant's claim of right under the modification to accelerate the payment date of the appellees' then unaccrued installment payments under the written contract collapsed, and the appellant's unilateral withholding of the sum of $180,000.00 then due appellees on the accounting for crop profits was a tortious conversion." (Petitioner's Appendix at 3)

II

THE FINDING OF THE DISTRICT COURT SHOULD NOT BE DISTURBED.

The Ninth Circuit has adopted the "clearly erroneous" rule regarding findings of fact pursuant to Rule 52(a) of the Federal Rules of Civil Procedure requring that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge and the credibility of the witnesses." Federal Rules of Civil Procedure, Rule 52(a).

The Petitioner's total lack of proof of an oral modification cannot possibly mean that the findings of the District Court were "clearly erroneous". The findings should not be disturbed.

III

THE COURT OF APPEALS HAS NO JURISDICTION TO REDUCE THE JUDGMENT.

Petitioner requests that the Court of Appeals reduce the judgment against the Petitioner by an amount equal to two $60,000.00 promissory notes which allegedly became payable by Respondents to Petitioner between the entry of the trial court's findings of fact and the Court of Appeal's entry of judgment.

The Court of Appeals has no jurisdiction to grant relief beyond the facts set forth in the trial record. This was not at issue at trial and cannot therefore be resolved on appeal.

If in fact Respondents do owe money on these notes and have defaulted, Petitioner may initiate appropriate litigation.

CONCLUSION

The Petitioner in this action tortiously converted Respondents' money. Petitioner's only defense was that there was an oral modification of a written contract. Relying on a multiplicity of facts, the District Court found that there was no such oral modification. Petitioner is simply trying to retry this case and have another day in court. This does not constitute cause for granting a Writ of Certiorari. Moreover, Petitioner is asking this Court to grant relief beyond its jurisdiction.

It is respectfully submitted that for the foregoing reasons this Petition for Writ of Certiorari should be denied.

DATED this 26th day of June, 1975.

Respectfully submitted,

Anthony D. Terry

ANTHONY D. TERRY
Counselor for Respondents